SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-233

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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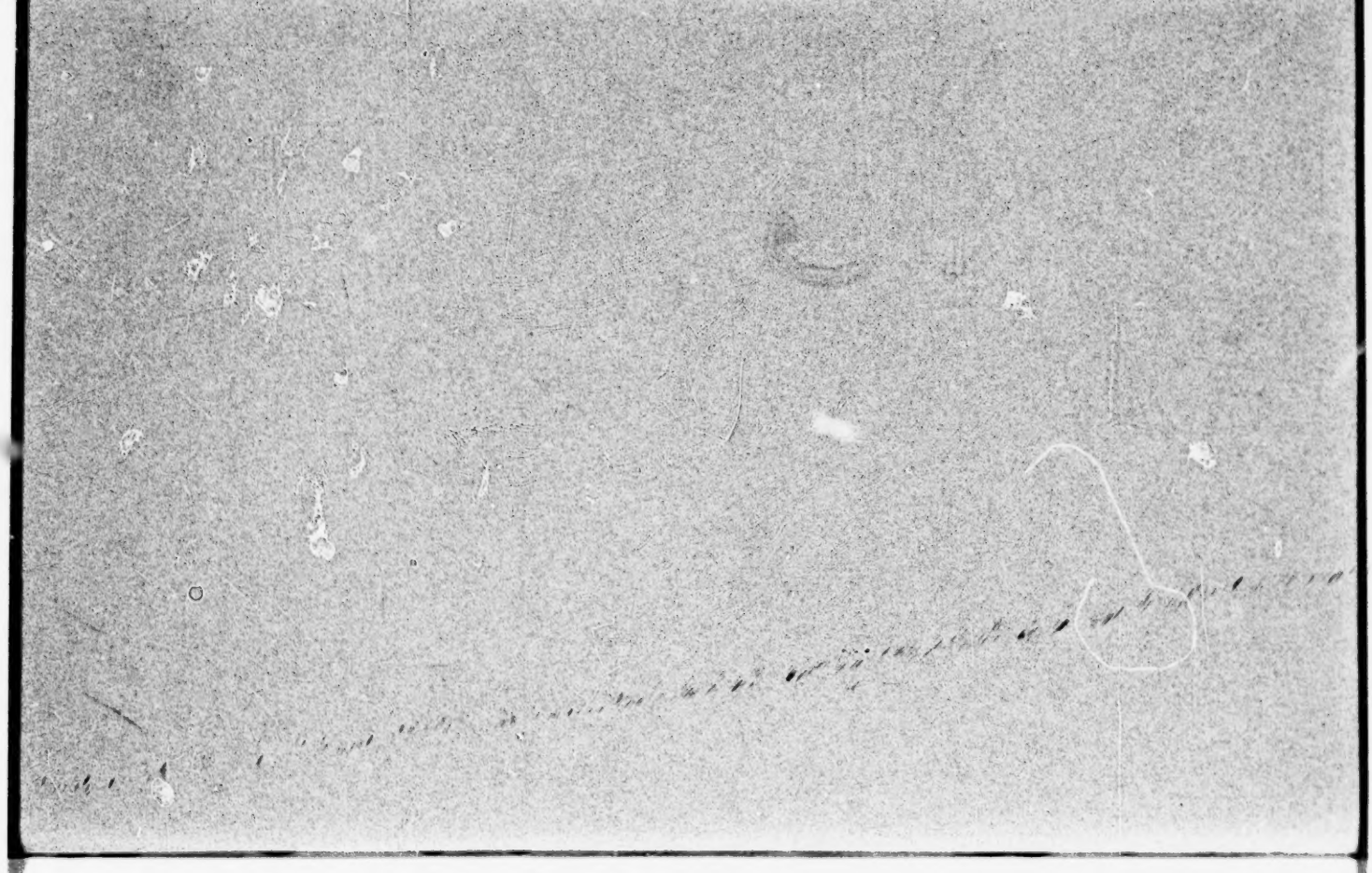

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CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Department of Transportation of the State of Maryland prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 6, 1974, affirming an order of the Civil Aeronautics Board adopted February 6, 1973 and affirmed by the Civil Aeronautics Board on reconsideration on July 5, 1973.[1]

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[1] Petitions for review of the same order of the Civil Aeronautics Board by the Department of Transportation of the State of Maryland and the Commonwealth of Virginia were consolidated in the United States Court of Appeals for the Fourth Circuit. The Commonwealth of Virginia is also petitioning this Court for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported at this writing; it is printed in Appendix A hereto, page 1a. The orders and opinions of the Civil Aeronautics Board are unreported and are printed in Appendix B hereto at pages 86a to 135a. The Initial Decision of the Administrative Law Judge is unreported and is printed in Appendix B hereto at page 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on June 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Whether, having found that the shippers of air freight in Maryland directly compete with those in the New York area for European business, the Civil Aeronautics Board must as a matter of law require equal rates between both areas and Europe.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory provisions involved are as follows and are contained in Appendix C hereto:

Constitution of the United States, Article I, section 9, clause 6, Appendix C, page 136a.

Federal Aviation Act of 1958:

§ 404(b) [49 U.S.C. § 1374(b)], Appendix C, page 136a.

§§ 1002(f) [49 U.S.C. § 1482(f)], Appendix C, page 137a.

Interstate Commerce Act:

Sec. 3 [49 U.S.C. 3], Appendix C, page 137a.

Sec. 216 [49 U.S.C. 216], Appendix C, page 138a.

STATEMENT OF THE CASE

This case involves the validity of the air freight rate structure between the United States and Europe, primarily with reference to the relationship of those rates as between New York, on the one hand, and Baltimore, Washington, and Philadelphia, on the other hand. The case originated with a complaint by Baltimore filed on November 29, 1968, and a resulting order of the Civil Aeronautics Board inaugurating a formal investigation with respect to Baltimore, Washington, Philadelphia and New York (Appendix B, page 87a). Subsequently the case was expanded by interventions to include Boston, Chicago, Cleveland, and Detroit.

The transatlantic air freight rate structure is prescribed by resolutions of the International Air Transport Association (IATA), which includes in its membership most of the foreign flag air carriers serving the United States and all of the U.S. flag carriers serving Europe, except Seaboard World Airlines. There are 26 foreign flag members and 3 U.S. flag members which are engaged in, and vote on, transatlantic air transportation. All IATA member carriers have an equal vote, and amendments to rates must be carried by a unanimous vote.

The rate structure consists of general commodity rates, specific commodity rates, and container or "bulk unitization" rates. The basic rates are the general commodity rates, but in the north Atlantic markets air freight moves largely under specific commodity rates

and, increasingly, under the discounted container rates. Specific commodity rates normally represent a discount from the general commodity rates for the purpose of attracting business from surface transportation. Between 65 per cent and 85 per cent by weight (depending on the carrier) of all transatlantic air freight moves under the specific rates (Appendix B, page 95a).

The Civil Aeronautics Board has no statutory authority to fix international rates in the first instance (as it does domestic rates), but does have authority to alter such rates to the extent necessary to correct a preference or prejudice which it may find to result from such rates. (49 U.S.C. § 1482(f), Appendix C, page 137a).

The specific issue before the Civil Aeronautics Board was whether the rate structure across the north Atlantic prefers New York and prejudices the other cities in violation of section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (Appendix C, page 136a.); and, if so, how the Board should remedy the situation under section 1002(f) of the Act, 49 U.S.C. § 1482(f) (Appendix C, page 137a). The Board found that the rate structure is unduly preferential to New York (Appendix B, page 116a.), and it ordered the air carrier parties to remove the preference by applying to the other named cities the

> "New York-European point rates per mile multiplied by the distance in miles between such cities and the point in Europe." (Appendix B, page 134a.)

Petitioner considers that the Board correctly found the rate structure invalid but that the mileage formula

prescribed, which is novel in ratemaking, fails to provide an adequate remedy and is capricious. The remedy primarily urged by petitioner before the Board, and before the Court of Appeals, is equalization of the rates as between Baltimore/Washington[2] and Philadelphia, on the one hand, and New York, with which these cities compete, on the other hand. This was the remedy recommended, after full hearings, by Administrative Law Judge William F. Cusick in his Initial Decision (Appendix B, page 71a). The administrative law judge was overruled in this crucial respect by the Board. Petitioner sought unsuccessfully in the court below, and seeks here, to reinstate the remedy adopted by Judge Cusick.

The Board's mileage formula continues to prefer New York in various ways in addition to the lower amount of the New York rate. Because rates between New York and various European points are characterized by extensive common-rating over great mileage differences within Europe, New York shippers would still generally receive more transportation miles for the same or less cost than shippers from Baltimore/Washington. Further, the Board would impose its "strict mileage" formula on a rate structure consisting largely of specific commodity rates, which are not established on the basis of mileage and are not susceptible to such a basis.[3]

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[2] Baltimore and Washington are treated jointly for purposes of this case since they are already common-rated.

[3] Thus, distance is not even included as one of the ten criteria for establishment of specific commodity rates in the applicable resolution of IATA. Indeed, the Civil Aeronautics Board itself has previously come to the same conclusion in a case which it has not even attempted to distinguish here. *Theodor Manufacturing Corp.*, C.A.B. Order No. E-22710, Docket 16343, see below at page 6.

The anomalies still inhering in the transatlantic rate structure are not found in the domestic freight rate structure. The domestic tariffs are constructed upon a system of common-rating by zones, in the form of concentric circles radiating from each point of origin. Typically, the first zone is a band three or four hundred miles wide, and within that zone all rates to and from a given point are the same. Beyond the first zone the circles are typically reduced to 50 miles in width. It is a system of this general nature which petitioner urged upon the Board in this case, with the zones to be determined, as they are in transatlantic surface transportation, on the basis of competition between United States gateways.

Not only does the domestic freight rate structure basically reflect a system of common-rating, but such a system applies widely in the international sphere as well, particularly with respect to the specific commodity rates. Thus, common-rating has long applied among the north Atlantic ports, on the one hand, and the Far East, many South American points, Hawaii (including intra-Hawaii) and Puerto Rico. It applies to mail as well as freight among the competing ports of the United States west coast and the Far East despite mileage differentials up to 685 miles (i.e., the difference between Tokyo-Seattle and Tokyo-Los Angeles) (Appendix B, page 68a). Competing points in Europe now enjoy equal rates despite mileage differentials of over 1,000 miles (Appendix B, page 59a).

The Civil Aeronautics Board itself has expressly recognized in the past that "rates are generally es-

tablished by areas." In *Theodor Manufacturing Corp., supra,* the Board said

> "The second phenomenon of rate construction illustrated by the two markets discussed above is that *rates are generally established by areas.* In other words, many points in a particular geographic area are frequently assigned the same rate level despite mileage differences. * * * Such common rating has been a customary practice in both surface and air transportation over the years, and demonstrates the fact that distance is only one of many factors considered in the determination of the lawfulness of rates." (Order No. E-22710, pp. 2-3). (Emphasis supplied).

We think it clear that the Board should have followed its own reasoning here, as did its administrative law judge [4]

The reason for IATA's refusal to extend the principle of common-rating to the northeastern gateways here involved is, as found by the Board, that

> "the maintenance of the existing disparities is largely attributable to the desire of the carriers (principally foreign) who do not provide service to the other gateways to lessen the impact of dilution on their revenues from freight originating at or destined for gateways other than New York * * *. The carriers benefitting from this structure have been able to frustrate attempts to improve the rate structure by exercising veto power through the IATA unanimity rule." Appendix B, pages 99a-100a.

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[4] As Judge Friendly of the U.S. Court of Appeals for the Second Circuit has pointed out, one of the prevailing difficulties of the Civil Aeronautics Board throughout its history has been its failure to adopt and follow consistent standards of decision. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1972-97 (1962).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH HISTORIC CONGRESSIONAL POLICY, BOTH OF WHICH HAVE SOUGHT FOR OVER A CENTURY TO INSURE EQUALITY OF OPPORTUNITY BETWEEN COMPETING PORTS.

A. The Board Correctly Found Discrimination Between Ports of a Kind Which Has Historically Been Forbidden in All Transportation Media.

The Board has adopted Administrative Law Judge Cusick's findings that

> "the North Atlantic cargo rate structure maintained pursuant to agreement by the IATA carriers prefers New York and prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago; that each of the prejudiced cities is competitive with New York for the movement of transatlantic cargo, and that shippers in these cities are also in competition with shippers in the New York area; that the existing preference and prejudice is undue; and that the rate structure has resulted in economic injury to the complaining gateways, and to shippers utilizing the North Atlantic services available at those gateways." (Appendix B, pages 93a-94a).

These findings on their face require equality of access to the European markets as between the shippers and receivers of cargo in the respective areas indicated. The Board, however, overruling the experienced administrative law judge who presided throughout the lengthy proceedings,[5] has refused to require such

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[5] It is interesting to note the remarks of Chairman Robert D. Timm of the Board before a Boeing Company cargo marketing meeting at Seattle, Washington, on July 24th, 1974:

> "In my personal discussions with the aviation cargo crew—executives of all cargo airlines, and executives of the combination carriers—I find a common theme when the CAB is

equality on the ground that "charging the same rate for a longer distance [6] as for a shorter one is unsound and not justified under the Act" (Appendix B, page 106a); and because the carriers threaten to increase the entire level of rates to compensate for such allegedly uneconomic mileage.

We submit that the administrative law judge was clearly right. One of the fundamental principles of rate-making, applicable to all forms of transportation, is equality of opportunity between directly competing localities. This principle overrides other considerations, including much more significant differences in distance than are involved here. For example, the Interstate Commerce Commission normally commonrates competing points where the mileage difference is less than 25 percent, see *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709, 725 (1962).

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discussed. They make the point that air cargo matters do not seem to take on the dimension of significance that passenger items do—they make the point that a special attitude on rates, differing from established stances relative to passenger carriage, seems to prevail—they make the point that the Board's attention span on cargo matters seems somewhat limited—they make the point that we do not seem to have developed a specialized bloc of cargo expertise, because of our preoccupation with the human cargo. * * * I am not satisfied, either, with my knowledge on this subject or the depth of the Board's commitment to cargo matters."

[6] The average difference in mileage between the Baltimore and Washington International Airports and Kennedy International Airport at New York is about 190 miles or about five percent of the transatlantic distance from Kennedy to London (Appendix B, pages 7a, 9a).

Section 404(b) of the Federal Aviation Act requires that

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Appendix C, pages 136a-137a).

This case represents the first construction of this subsection by the Board or the courts in its application to international rates. This subsection was fashioned after sections 3(1) and 216(d) of the Interstate Commerce Act[7] (49 U.S.C., sections 3(1), 316(d) (Appendix C, pages 137a-138a)). Section 3(1) of the Interstate Commerce Act did not originally include "ports" along with "localities" with respect to discrimination, and in 1933 this Court held that "ports" were not "localities" within the intent of the section, *Texas & P.R. Co.* v. *United States,* 289 U.S. 627, 638 (1933); but in 1935 (49 Stat. 607) Congress added the words "port, port district, gateway, transit point" to section 3 (1). The report of the House Committee on Interstate and Foreign Commerce (H. Rep. 1512, 74th Cong., 1st Sess. (1935)), is instructive with respect to the problem here:

> "In recommending that this bill be passed, the committee does so with the idea in mind that by amending section 3 of the Interstate Commerce Act as thus contemplated it will encourage and

[7] See also the comparable provisions in the Shipping Act, 46 U.S.C., sec. 816, Appendix page 139a.

promote the freedom of movement of export, import, and coastwise commerce through the ports of the country. *The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will permit, and that no restrictions upon and impediments to the free moving thereof should be imposed that are not clearly shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports, and to deprive other ports of an opportunity to handle a part of such traffic.* The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne." (Emphasis supplied). (p.2).

It would appear that the 1935 amendment was required by the Constitution of the United States, which provides in Article 1, section 9, clause 6:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

This is a "limitation upon the power of Congress to regulate commerce for the purpose of producing *entire commercial equality within* the United States * * *." *Passenger Cases* (1849) 7 How. 283, 414 (Emphasis supplied).

One hundred years after the *Passenger Cases* a unanimous court approved, in *Ayrshire Collieries Corp.* v.

United States, 335 U.S. 573 (1949), rate-making action by the Interstate Commerce Commission described as follows:

> "But the Commission made plain that in considering the whole problem of rate relations presented by this case it did not rely strictly upon distance. Distance was a factor but it was not controlling. *The Commission deemed its task to be the creation of a rate structure that would afford a fair opportunity to compete* in the purchase, sale and transportation of the coal from the various mines to the destinations in question. (Emphasis supplied). [335 U.S. at 588.] * * * Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well." 335 U.S. at 592.

In *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658 (1930), the Court said

> "The prohibition in § 3 (1) of the Interstate Commerce Act of any undue preference of one locality over another always has been treated as intended to prevent the use of rates as a means of promoting the artificial development of one locality to the detriment of another." (p. 667).

This is exactly what the foreign carriers in IATA have accomplished here. The rate preference which they have insisted upon for New York has been, and remains, a principal factor in promoting the development of traffic (to the point of serious congestion, Appendix B, pages 101a-102a.) at Kennedy Airport, to the economic detriment of Baltimore-Washington International Airport and the shippers and receivers of air freight in Maryland and its environs.

B. The Decision Below Nullifies the Anti-discrimination Statute by Prescribing Novel Strict Mileage Rates Instead of the Historic Remedy of Equalization of Rates at Competing Ports.

The long history of transatlantic ocean rates, and the complementary rail export-import rates, finally came to rest upon the principle of equalization as between directly competing ports, including Boston, New York, Philadelphia and Baltimore, see *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830, affirmed by an equally divided Court, 373 U.S. 372 (1963), reh. den. 374 U.S. 859. For many years ocean rates between Europe and Philadelphia/Baltimore had been higher than the rates to New York and New England, and in compensation Philadelphia and Baltimore had enjoyed rail export-import rates from "Differential Territory" lower than those charged the northern ports. After the ocean rates were equalized the railroads serving the northern ports equalized the rail rates, despite the fact that the southern ports, particularly Baltimore, are located closer to Differential Territory. The Interstate Commerce Commission refused to approve the newly reduced rates on the ground that the location of Baltimore and the other southern ports entitled them to a differential rate, see *Equalization of Rates at North Atlantic Ports,* 311 I.C.C. 689 (1959). The Commission's decision was reversed by the U.S. District Court for Massachusetts which held, in effect, that the railroads were merely applying the settled principle of equality of opportunity between competing ports. The Court held further that Baltimore's proximity to Differential Territory did not support the Commission's decision, which

> "if pressed to its logical conclusion, would result in traffic flowing only through the most distance

favored port", *Boston and Maine Railroad* v. *United States, supra,* 202 F. Supp. at 837.

Actually the Commission's action culminating in the *Boston and Maine* case represented an aberration for the I.C.C., which had for many years recognized that one of its principal functions was the enforcement of equal opportunity among competing ports. Thus, the Commission has recently summarized its policy in this regard as follows:

> "The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public. Generally, such equalization has not been approved in areas close to the respective ports." *City of Wilmington* v. *Alabama G. S. R. Co., supra,* at 725.

It is clear that if the I.C.C. had been presented with the facts of the instant case, the Commission would have equalized the rates.

As the Associate General Counsel of the Commission has recently written:

> "The crux of this problem lies in the fact that the provisions of the Interstate Commerce Act that protect shippers and localities from the [sic] discrimination are not cost-oriented. When, for example, Congress amended the statute in 1935 to protect ports, it did not thereby seek to further the most efficient development of economic resources, except insofar as it might be consistent with its purpose to 'encourage and promote the freedom

> of movement . . . through the ports of the country,' so that commerce could 'move freely through as many available ports as the governing circumstances will reasonably permit.' For this reason, *the Commission has given controlling weight to considerations other than distance, which presumably measures certain costs, in requiring the railroads to equalize their rates between competing ports.*" Goodman, *Recent Trends in Transport Rate Regulation,* 70 Mich. Law Rev. 1223, 1245 (June, 1972). (Emphasis supplied).

The court below has followed the Board in declining to follow the Interstate Commerce Commission (and Maritime Commission) precedents on the grounds that the surface rate structure reflects somewhat different costs ratios, i.e., as between fixed and variable costs, from the airline industry (Appendix A, page 8a). This point is made by the Board in its opinion (Appendix B, page 109a) in the absence of any record evidence on the point, but we submit that in any event such differences as undoubtedly exist could not destroy the substantial relevance of the surface precedents (particularly with respect to ports as close together as New York, Philadelphia and Baltimore/Washington).

Another point on which the Board (Appendix B, page 106a-107a) and the court (Appendix A, pages 9a-10a) rely is, we submit, equally unpersuasive. This is the fear that as the rates are equalized between New York, Philadelphia and Baltimore/Washington, this may in turn necessitate further equalization with other cities. As to this, petitioner would simply say "so be it" if the showing of direct competition which has been made here were to be made for such other cities. This fear recalls Justice Holmes' aversion to the argu-

ment that we do not dare to correct the particular injustice which is in front of us because if we do it may be necessary to go one step further and then another, and so on.

Petitioner submits that the court below has, without independent analysis, simply adopted an aberrant administrative action which conflicts with an historic Congressional policy recognized in decisions of this Court.

II. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The decision below will raise significant and recurring problems of international and interstate ratemaking, both air and surface. The revolutionary impact of the Board's decision has already manifested itself in respect to the west coast international airports, as shown below. The decision has ultimate implications for the domestic air freight rate structure, which is also substantially based on common-rating. Further, the effects of the decision will not be confined to air transportation, and may well bring into question the present equalization of ocean, and rail export-import, rates.

The Civil Aeronautics Board has already been forced to reverse its decision in this matter to the extent of equalizing the rates as between Detroit and Windsor, Canada, by reason of the "intense competition between transatlantic carriers operating out of these two cities", C.A.B. Order 74-7-130, Docket 20522, dated July 29, 1974. While this action is stated to be an "interim departure from the rate-per-mile concept", (p. 3), never-

theless it clearly brings back into focus the reality that direct competition requires equal—and not almost equal—rates.

As a result of the Board's decision here in question, the Port of Seattle (and associated parties) filed with the Civil Aeronautics Board on October 12, 1973 a "Petition for Order Amending Service Mail Rates". In this petition Seattle seeks to overturn the long-standing equalization of transpacific air mail rates as between Seattle and San Francisco, see above at page 6. The basis for this petition is stated to be the Board's decision here. While Seattle's petition relates only to mail rates, it may be confidently anticipated that the air freight rates as between these points (and Los Angeles and San Diego as well) will soon be questioned on the same ground. Nor is there any reason to doubt that this process of reexamination will stop on the west coast. On the contrary, there is every reason to expect that cities throughout the country which have a "geographic advantage" over a competing city, now common-rated, will seek to realize such advantage.

Thus the decision below, "if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port", *Boston and Maine Railroad* v. *United States, supra,* 202 F. Supp., at 837. Such a result would reverse a long-standing national policy approved by this court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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